A

LEMBAGA MINYAK SAWIT MALAYSIA & ANOR v. INNOVANS PALM INDUSTRIES SDN BHD

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ZABIDIN MOHD DIAH JCA
S NANTHA BALAN JCA
B DARRYL GOON SIEW CHYE JCA
[CIVIL APPEAL NO: P-01(A)-172-04-2021]
9 SEPTEMBER 2021

C **Abstract** – *Not all decisions of a public authority are amenable to judicial review. In judicial review proceedings, it is imperative for the High Court to make a determination as to whether a particular decision by a public authority is amenable to curial scrutiny via judicial review. In determining the question of 'justiciability' of an Executive decision,* D *apart from the source of power, the High Court must also examine the function being performed by the person whose decision is being challenged.*

E ***ADMINISTRATIVE LAW:*** *Judicial review – Appeal against – Parties charged at Magistrates' Court for offence of exporting palm oil without licence – Owner requested for release of property but request turned down by public authority – Owner commenced judicial review proceedings against public authority – Whether impugned decision amenable to judicial review – Whether High Court in exercising civil jurisdiction via judicial review, should decline application – Whether may interfere with matters pending criminal trial at Magistrates' Court – Whether* F *impugned decision made within ambit of or contrary to law – Whether rational or suffered from any procedural impropriety*

Pursuant to various freight on board contracts ('FOB contracts'), the respondent sold used cooking oil ('UCO') to Kazhou Pte Ltd ('Kazhou') which was intended to be exported. Pursuant to the FOB contracts, the G respondent delivered 4,579.91 metric tons ('MT') of UCO ('subject UCO') to Kazhou which were stored in the storage tanks at the premises operated by FIMA Butterworth Installation Sdn Bhd ('FBI') and/or FIMA Palmbulk Services Sdn Bhd ('FPS') in Butterworth, Penang. The subject UCO were stored in ten storage tanks belonging to FBI and one storage tank belonging H to FPS. Shortly before the subject UCO was about to be loaded onto the vessel MT Chem Venus ('vessel'), the first appellant ('MPOB') seized the subject UCO in connection with investigations and prosecution which were being carried out by MPOB against one Kyrox Sdn Bhd ('Kyrox') and Chew Gek Suan ('Chew'). Kyrox and Chew were later charged at the Magistrates' I Court ('Criminal Summons 376') for the offence of exporting palm oil without a licence, contrary to the Malaysian Palm Oil Board (Licensing)

Regulations 2005. MPOB did not take any action against the respondent or Kazhou in regards to the export of the subject UCO. Instead, MPOB treated the seized items as sludge palm oil. The respondent wrote to MPOB and sought the release of the subject UCO to themselves as owners. MPOB turned down the respondent's request ('impugned decision'). The respondent applied for judicial review in the High Court for an order of *certiorari* to challenge the impugned decision and an order of *mandamus* for the delivery of the subject UCO ('JR 50'). The Judicial Commissioner ('JC') allowed the respondent's application. Hence, the present appeal. The issues that arose were: (i) whether the impugned decision being part and parcel of an exercise of investigative function by MPOB was amenable to judicial review; (ii) whether the High Court in exercising its civil jurisdiction *via* judicial review, should decline the application as it may interfere with matters pending criminal trial at the Magistrates' Court; and (iii) whether the impugned decision was made within the ambit of or contrary to the law, was rational or irrational, or suffered from any procedural impropriety.

Held (allowing appeal)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) Criminal investigative process, as well as the prosecutorial process, must necessarily be immune from curial scrutiny or interference *via* judicial review. As such, to allow judicial review in and over the subject UCO will interfere with Criminal Summons 376 instituted against Kyrox and Chew. Thus, the impugned decision was not amenable to judicial review. (para 54)

(2) In as much as the subject UCO were seized by MPOB, there was a general power per s. 54 of the Malaysian Palm Oil Board Act 1998 ('Act') which provided that any seized products or proceeds of sale of the seized product made under the Act shall be liable to forfeiture. In any event, MPOB had instituted prosecution in relation to subject UCO and as such, it was for the Magistrate presiding in Criminal Summons 376 to make the order for forfeiture (if any) or release of the subject UCO. (paras 55 & 56)

(3) Based on ss. 53, 54 and 56 of the Act, where prosecution had been instituted for an offence under the Act, it was clear that the Director General ('DG') was empowered to secure and keep custody of the seized products or dispose of the goods and keep the proceeds of the seized products, pending the outcome of the prosecution at the Magistrates' Court. In the result, the court did not agree with the JC's conclusion that the impugned decision was amenable for review by way of judicial review as it was clear that the DG was merely exercising his part and parcel of 'investigative function' in refusing to entertain the respondent's claim for the release of the subject UCO which was in turn predicated

on their assertion of purported 'ownership' of the subject UCO. Clearly, by allowing the judicial review and compelling MPOB to return the subject UCO to the respondent, the High Court in the exercise of its civil supervisory jurisdiction had effectively interfered with the criminal jurisdiction which was to be exercised by the Magistrates' Court under the Act. (paras 59-61)

(4) There was no procedural impropriety, abuse of power or any *mala fides* on the part of MPOB and the DG. The respondent had failed to meet the high evidential threshold to establish *mala fides* on the part of the appellants. There was also failure on the part of the JC to properly appreciate the distinguished features between cases where there were prosecution and cases where there were none in s. 56 of the Act which led to an error of law that had vitiated the decision of the High Court. Since prosecution had commenced, the respondent as the alleged owner may not invoke s. 57(1) of the Act. The decision of the JC was set aside and substituted with an order that the judicial review was dismissed. (paras 73 & 77-79)

Case(s) referred to:

Ahmad Azam Mohamed Salleh & Ors v. Jabatan Pembangunan Koperasi Malaysia & Ors [2004] 1 LNS 2009 HC ***(refd)***

City Growth Sdn Bhd & Anor v. The Government Of Malaysia [2005] 7 CLJ 422 HC ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC ***(refd)***

Innovans Palm Industries Sdn Bhd v. Lembaga Minyak Sawit Malaysia & Anor [2021] 1 LNS 936 HC ***(refd)***

R v. Sloan [1990] 1 NZLR 474 ***(refd)***

Suruhanjaya Pencegahan Rasuah Malaysia & Ors v. Latheefa Beebi Koya & Anor [2017] 10 CLJ 1 FC ***(refd)***

Union of India And Ors v. Ashok Kumar And Ors [2005] 8 SCC 760 ***(refd)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, s. 50(1)

Federal Constitution, art. 13

Malaysian Anti-Corruption Commission Act 2009, s. 30(1)(a)

Malaysian Palm Oil Board Act 1998, ss. 53(1)(b), 54, 55, 56(1), (2), (3), (5), 57(1), (2), 58

Malaysian Palm Oil Board (Licensing) Regulations 2005, reg. 5(1)(i)

Rules of Court 2012, O. 53 r. 3(5)

For the appellants - Noor Hisham Ismail & Raihan Roselan; M/s Najib Hisham Isa

For the appellant - Terence Chan Kah Meng & Goh Tseng Fook Bryan; M/s Lim Kian Leong & Co

[Editor's note: For the High Court judgment, please see Innovans Palm Industries Sdn Bhd v. Lembaga Minyak Sawit Malaysia & Anor [2021] 1 LNS 936 (overruled).]

Reported by Lina E

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] The appellants are Lembaga Minyak Sawit Malaysia (Malaysian Palm Oil Board) (first appellant) and Ketua Pengarah Lembaga Minyak Sawit Malaysia (Director General – Malaysian Palm Oil Board) (second appellant). The first appellant is a statutory body established pursuant to the Malaysian Palm Oil Board Act 1998 ('the Act') to promote and develop national objectives, policies and priorities for the wellbeing of the Malaysian palm oil industry. The second appellant is the director general of the first appellant appointed under the Act. The respondent is Innovans Palm Industries Sdn Bhd (Company No: 385096-K) ('respondent'). The respondent is licensed by MPOB to sell, purchase, store and export various palm oil products.

[2] Pursuant to various Freight on Board contracts ('FOB contracts') the respondent sold used cooking oil ('UCO') to Kazhou Pte Ltd ('Kazhou') which was intended to be exported. Pursuant to the FOB contracts, the respondent delivered 4,579.91 metric tons (MT) of UCO ('the subject UCO') to Kazhou which were stored in the storage tanks at the premises operated by FIMA Butterworth Installation Sdn Bhd ('FBI') and/or FIMA Palmbulk Services Sdn Bhd ('FPS') in Butterworth, Penang. To be exact, the subject UCO were stored in ten storage tanks belonging to FBI and one storage tank belonging to FPS. On 26 May 2020, shortly before the subject UCO was about to be loaded onto the vessel MT Chem Venus ('the vessel'), MPOB seized the subject UCO in connection with investigations and prosecution which was being carried out by MPOB against one Kyrox Sdn Bhd ('Kyrox') and Chew Gek Suan ('Chew'). Kyrox and Chew were later charged per Butterworth Magistrate's Court Criminal Summons No: PB-87-376-07-2020 ('Criminal Summons 376') for the offence of exporting palm oil without a licence contrary to the Malaysian Palm Oil Board (Licensing) Regulations 2005 (PU(A) 516/2005). The charge against Kyrox and Chew reads as follows:

> Bahawasanya kamu, pada 26 Mei 2020 jam 12.30 pagi bertempat di Dermaga 2, Dermaga Air Dalam, Pelabuhan Butterworth, di dalam Daerah Seberang Perai Utara, dalam Negeri Pulau Pinang, telah didapati **cuba mengeksport minyak sawit tanpa lesen** sepertimana yang dikehendaki di bawah Peraturan 5(1)(i) Peraturan-Peraturan Lembaga Minyak Sawit Malaysia (Pelesenan) 2005 (Diwartakan sebagai P.U(A) 516), oleh yang demikian kamu telah melakukan satu kesalahan di bawah Peraturan 5(3), Peraturan-Peraturan yang sama, dibaca bersama Seksyen 70(1) Akta Lembaga Minyak Sawit Malaysia 1998 (Akta 582).
>
> (emphasis added)

[3] MPOB did not take any action against the respondent or Kazhou in regard to the export of the subject UCO. As far as the respondent was concerned, they took the position that they were the "owners" of the subject UCO as property had not passed to Kazhou as the latter had not made payment in full and there was a sum of USD1,606,203.97 which was due and payable by Kazhou to the respondent. In terms of nomenclature and description of the seized items, it is relevant to mention that MPOB does not accept that the items seized were UCO. Instead, MPOB treats the seized items as sludge palm oil ('SPO'). For the sake of consistency, we shall continue to refer to the seized items as the subject UCO. It is also relevant to mention that the storage costs of SPO (or the subject UCO) is RM331,200 per month. The storage cost is relevant in the context of the exercise of powers under s. 53 of the Act wherein MPOB may dispose of seized items if storage is inconvenient and the cost is prohibitive.

[4] The respondent wrote to MPOB and sought the release of the subject UCO to themselves as owners. The respondent's request for the release of the subject UCO was made pursuant to ss. 57 and 58 of the Act. The respondent's request for the release of the subject UCO was turned down by MPOB, per letter dated 27 August 2020 ('the impugned decision'). The respondent applied for judicial review *via* Penang High Court Application for Judicial Review No. PA-25-50-09-2020 ('JR50') for an order of *certiorari* to challenge the impugned decision, and an order of *mandamus* for delivery of the subject UCO.

[5] In the course of the progression of JR50, MPOB's counsel intimated to the JC that there was an urgent need to dispose of the SPO in light of the escalating costs and that the disposal process will take one to two months. As mentioned earlier, the power to dispose of seized items due to high costs and inconvenience is provided for in s. 53 of the Act.

[6] By a decision of dated 26 March 2021, the learned Judicial Commissioner ('JC') allowed the respondent's application per JR50 with costs of RM20,000. The JC's grounds of judgment are reported as *Innovans Palm Industries Sdn Bhd v. Lembaga Minyak Sawit Malaysia & Anor* [2021] 1 LNS 936; [2021] 5 AMR 831; [2021] AMEJ 0889; [2021] MLJU 1109 (HC). On 9 September 2021, we allowed the appeal and set aside the decision of the JC. Our reasons for allowing the appeal now follow. For convenience, we shall refer to the first appellant as "MPOB" and the second appellant as "the DG". Where necessary, MPOB and the DG shall be referred to collectively as "the appellants".

The Respondent's Case

[7] The essence of the respondent's case is that they had entered into the FOB contracts with Kazhou for the sale of the subject UCO and that they had sent the subject UCO to FIMA Palmbulk (FBI/FPS) for storage prior to

shipment to Kazhou. According to the respondent, between December 2019 to May 2020 they had entered into the contracts to sell UCO to Kazhou based on the FOB contracts, brief details of which are as follows:

No.	Date	Contract No	Metric Tonnes	USD (M/T)
1.	19.12.2019	ISB7327S-1	900 MT	750.00
2.	27.12.2019	ISB7336S	1000 MT	750.00
3.	28.4.2020	ISB7556S	1000 MT	660.00
4.	6.5.2020	ISB7567S	1000 MT	660.00
5.	13.5.2020	ISB7579S	2000 MT	680.00
Total Quantity			5900 MT	
Quantity Delivered			4,579.91 MT	

[8] Consequent to the FOB contracts as above, as at 26 May 2020, the respondent delivered 4,579.91 MT of UCO to the storage tank owned and controlled by FIMA Palmbulk in Butterworth Port, leaving another 1,320.09 MT still to be delivered. The respondent also issued separate invoices under the FOB contracts for each delivery to track the amount delivered to the FIMA Palmbulk storage and these invoices were issued from the respondent's standard invoicing template. It is alleged that Kazhou was fully aware that the prevailing terms of the export are based on the FOB contracts. FIMA Palmbulk, appointed by Kazhou, is also licensed by the MPOB to store the subject UCO which had been delivered by the respondent.

[9] As a result of MPOB's seizure, Kazhou (and Kyrox) jointly initiated judicial review proceedings against MPOB *via* Penang High Court Application for Judicial Review No. PA-25-27-06-2020 ('JR27'). The respondent was not a party to JR27.

[10] The respondent applied to intervene in JR27 with the objective of providing documentary evidence of the sale of the subject UCO. The respondent's application to intervene was rejected due to a procedural technical objection raised by MPOB. Ultimately, on 21 August 2020, the Penang High Court dismissed Kazhou's application in JR27 on the basis that investigation was ongoing and that MPOB was entitled to carry out investigation under the law.

[11] It is material and significant that in JR27, Kazhou had asserted that they are the "owners" of the subject UCO, whilst Kyrox was their "exporting agent". Kazhou's assertion on ownership is seen in the affidavit of their operations manager, one Zorlinda binti Roslan dated 15 June 2020 at para. 7, which reads as follows:

> 7. Permohonan kebenaran ini juga memohon perintah agar responden (MPOB) tidak mengganggu selanjutnya penjualan **barangan milik Pemohon Pertama** yang kini sedang disimpan di 11 tangki di fasiliti penyimpanan di Butterworth Penang. 10 daripada 11 jumlah tangki adalah

A milik Fima Butterworth Installation Sdn Bhd (FBI) di mana yang lain adalah milik Fima Palmbulk Services Sdn Bhd (FPS). FBI dan FPS adalah sebahagian daripada FIMA Bulking Group. (emphasis added)

[12] Whilst on the topic of "ownership", it is relevant to mention the existence of yet another judicial review application *viz* Shah Alam High Court B Application for Judicial Review No. BA25-60-08-2020 ('JR60'), wherein the applicants were Vandelay Ventures Sdn Bhd and Sepang Dynamics Sdn Bhd. They were similarly circumstanced as the respondent in that they too had sold UCO to Kazhou and stored at FIMA Palmbulk and which were also seized by MPOB.

C **[13]** In the course of opposing JR60, MPOB, through para. 5 of the affidavit of the DG affirmed on 12 October 2020, asserted that Kazhou was the "owner" of the SPO which was seized. As a result, *via* an undated letter, Kazhou wrote to Innovans and stated, *inter alia*:

D We have been advised that MPOB has acknowledged in the affidavit affirmed by MPOB/Director General on the 12.10.2020 in Shah Alam High Court Judicial Review No BA-25-60-08/2020 that the seized "Sludge Palm Oil" belongs legally to us.

Whilst we acknowledge that the term of the above sale between us and your goodself is based on "freight on board" terms and that the E ownership of the goods do not pass until payment in full has been effected by us, we wish to confirm our conversation last week that we will have no objections the goods are released by MPOB and/or the court to your goodself in order that both parties can complete the transaction above.

F We look forward to hearing from you in due course.

Correspondence

[14] We turn now to the relevant correspondence between the respondent and MPOB.

G **[15]** On or around 8 July 2020, the respondent issued a letter to MPOB pursuant to ss. 57 and/or 58 of the Act and provided all the supporting documents to claim ownership. The said letter reads as follows:

INNOVANS PALM INDUSTRIES SDN. BHD. (385096-K)

8 July, 2020

H

LEMBAGA MINYAK SAWIT MALAYSIA
No. 6, Persiaran Institusi,
Bandar Baru Bangi
43000 Kajang

I Surat Berdaftar/Faks/Email

Untuk Perhatian:

(1) Ketua Pengarah
a. Yg Berbahagia Dr Ahmad Parveez Ghulam Kadir

(2) Ketua Wilayah Utara (MPOB Wilayah Utara)
a. En Noor Azizul Bin Ibrahim

(3) Penolong Pegawai Penguatkuasa (MPOB Wilayah Utara)
a. En Nor Afendi Shahuddin

Tuan,

Notis di bawah Seskyen 57 dan/atau 58 Akta Lembaga Minyak Sawit Malaysia 1998 - Penutupan Dan Penahanan Tangki-tangki Minyak Masak Terpakai di Butterworth

Kami merujuk kepada perkara di atas.

INNOVANS PALM INDUSTRIES SDN BHD ("INNOVANS") merupakan sebuah syarikat yang telah ditubuhkan pada 24.4.1996 yang giat dalam perdagangan, impot dan ekspot, pembungkusan, penyimpanan tangki, perkhidmatan pengangkutan tanker dan pemprosesan produk sawit dan laurik. Innovans juga telah dilesenkan oleh pihak Lembaga untuk menjalankan perbagai aktiviti tertentu di bawah Akta Lembaga Minyak Sawit Malaysia. Sesalinan lesen daripada pihak Lembaga di lampirkan Bersama surat ini sebagai "Ekshibit A".

Innovans juga terlibat di dalam perniagaan pembelian dan penjualan minyak masak terpakai ("UCO") dan salah seorang daripada pelanggan ekspotnya adalah KAZHOU PTE LTD yang mempunyai alamat di Republik Singapura. Butir-butir ini telah kami sediakan dari semasa ke semasa apabila audit tahunan di jalankan oleh pihak Lembaga, walaupun penjualan ekspot UCO ini tidak memerlukan sebarang lesen, seperti yang difahamkan.

Innovans telah bermula pengekspotan UCO kepada Kazhou Ltd semenjak tahun 2019 dan penjualan ekspot UCO ini boleh diperlihatkan daripada borang kastam K2 untuk ekspot/jualan yang di laporkan oleh Innovans kepada Jabatan Kastam, sesalinan yang mana kini kami lampirkan di sini sebagai "Ekshibit B" untuk perhatian pihak tuan.

Selaras dengan pertalian perdagangan di antara Innovans dengan Kazhou Pte Ltd sebagai pengekspot dan pengimpot, Innovans telah baru-baru ini telah menjual secara ekspot UCO berjumlah 5,900 metrik tan kepada Kazhou Pte Ltd di mana Salinan kontrak-kontrak tersebut juga dilampirkan di sini sebagai "Ekshibit C".

No.	Tarikh	Kontrak No	Metrik Tan	USD (M/T)
1.	19.12.2019	ISB7327S-1	900 MT	750.00
2.	27.12.2019	ISB7336S	1000 MT	750.00
3.	28.4.2020	ISB7567S	1000 MT	660.00
4.	6.5.2020	ISB7567S	1000 MT	660.00
5.	13.5.2020	ISB7579S	2000 MT	680.00
Jumlah Keseluruhan			5900 MT	
Jumlah dihantar			4579.91 MT	

Lanjutan daripada kontrak-kontrak di atas, pihak kami juga telah, setakat tarikh ini, menghantar muatan sebanyak 4,579.91 metrik tan ke Pelabuhan Pulau Pinang, iaitu ke tangki-tangki penyimpanan FIMA Palmbulk (dilantik oleh Kazhou Pte Ltd), sementara menunggu pemunggahan keatas kapal dan/atau pindahmilik dan/atau pembayaran penuh seperti diperuntukkan di bawah kontrak-kontrak di atas. Borang K2 untuk ekspot tersebut juga akan di sediakan apabila tiba masa kelak oleh pihak kami.

Kami di fahamkan bahawa baru-baru ini, pihak Lembaga telah menyita (seal) tangki-tangki penyimpanan FIMA Palmbulk tersebut di mana muatan jualan UCO kepunyaan Innovans di bawah kontrak-kontrak kami telah di tahan.

Tujuan kami menulis kepada Ketua Pengarah di sini adalah untuk memohon dan/atau merayu supaya pelepasan tangki-tangki penyimpanan tersebut dan/atau kandungan UCO milikan Innovans dapat dibenarkan oleh Ketua Pengarah dan supaya jualan tersebut dapat diteruskan dan disempurnakan di antara pihak kami dengan Kazhou Pte Ltd.

Sebagai tambahan pula, semenjak Perintah Kawalan Pergerakan yang dilaksanakan daripada 18.3.2020 perniagaan dan aliran tunai Innovans juga telah memang terjejas memandangkan wabak covid 19 tersebut sehingga kami terpaksa merayu kepada Kazhou Pte Ltd untuk pembayaran awal (advance) atau sebahagian untuk menampung keadaan kewangan Innovans memandangkan Innovans mempunyai tenaga kerja sebanyak 82 orang pekerja di seluruh Malaysia. Selagi tangki-tangki penyimpanan tersebut di tahan dan kandungannya tidak dibenarkan untuk di muatkan ke atas kapal dan dipindah milik daripada Innovans kepada Kazhou Pte Ltd, jualan kontrak tersebut tidak dapat disempurnakan dan Innovans akan terus mengalami kesukaran dari segi kewangan/pembayaran.

Oleh itu, kami merayu dan sesungguhnya berharap supaya permohonan perlepasan ini dapat dipertimbangkan oleh Ketua Pengarah atas latar belakang di atas dan/atau langkah sewajarnya diambil oleh pihak Ketua Pengarah.

Jasa baik Ketua Pengarah di dalam perkara ini adalah amat dihargai dan didahului dengan ribuan terima kasih.

Yang benar,

Dato Tan Chee Chuan
Pengarah
Innovans Palm Industries Sdn Bhd

SK
(1) YB Dato' Dr Mohd Khairuddin bin Aman Razali
Menteri Kementerian Perusahaan Perladangan dan Komoditi
Aras 13, No 15 Persiaran Perdana, Presint 2,
62654 Putrajaya, Malaysia.

[16] MPOB replied *via* letter dated 14 July 2020. By that letter MPOB conveyed their rejection of the respondent's request stating that an investigation is on-going and charges would be instituted if there is any infringement of the law. MPOB's letter reads,

> **L**EMBAGA MINYAK SAWIT MALAYSIA
> Malaysian Palm Oil Board
>
> Ruj. Kami/Our Ref.: (3)04/C/PD/536/4 Jil. 1
>
> 14 Julai 2020
>
> YBhg. Dato' Tan Chee Chuan
> Pengarah Innovans Palm Industries Sdn. Bhd.
> Lot 11918, Jalan Ikan Bawal, Telok Gong
> 42000 Port Klang Selangor Darul Ehsan.
>
> YBhg. Dato',
>
> **Notis Di Bawah Seksyen 57 Dan/Atau 58 Akta Lembaga Minyak Sawit Malaysia 1998 Penutupan Dan Penahanan Tangki-tangki Minyak Masak – Terpakai Di Butterworth**
>
> Dengan hormatnya surat YBhg. Dato' bertarikh 8 Julai 2020 berkaitan perkara di atas dirujuk.
>
> 2. Terlebih dahulu saya ingin menjelaskan bahawa kerja-kerja penguatkuasaan undang-undang Lembaga Minyak Sawit Malaysia (MPOB) sentiasa dijalankan dengan telus dan adil. Maklumat dan aduan yang diterima daripada orang awam berkaitan perlanggaran peruntukan undang-undang MPOB akan dianalisa faktanya dan seterusnya disiasat dengan teliti mengikut kuasa yang diperuntukkan di bawah perundangan MPOB dan Prosedur Operasi Standard (SOP) yang ditetapkan.
>
> 3. Penyiasatan yang dijalankan adalah untuk mengesahkan kesahihan maklumat yang diterima berkenaan perlanggaran undang-undang MPOB sebelum tindakan sewajarnya diambil. Status dan motif pemberi maklumat atau pengadu tidak diambil kira dalam hal penguatkuasaan dan dengan itu tidak timbul pengaruh pihak ketiga dalam urusan kerja-kerja penguatkuasaan undang-undang MPOB.
>
> 4. Setelah siasatan bermula dan sekiranya kesalahan terhadap undang-undang MPOB didapati telah dilanggar, tindakan penguatkuasaan akan diambil mengikut perundangan MPOB. Tiada pengecualian dalam perkara ini, oleh yang demikian rayuan pihak tuan supaya melepaskan keluaran kelapa sawit yang disita tidak dapat dipertimbangkan. Jika rayuan ini diberi perhatian ianya adalah satu penghinaan kepada profesionalisme dan integriti pegawai-pegawai MPOB sebagai sebuah agensi penguatkuasaan.
>
> 5. MPOB memahami akan cabaran yang dihadapi oleh pihak industri namun kelangsungan dan kelestarian industri kelapa sawit negara sentiasa menjadi keutamaan kepada MPOB dan Kementerian Perusahaan Perladangan dan Komoditi (KPPK).

Sekian, terima kasih.

Yang benar,

DR. AHMAD PARVEEZ HJ. GHULAM KADIR
Ketua Pengarah, MPOB

s.k YB Dato' Dr. Mohd Khairuddin bin Aman Razali
Menteri Perusahaan Perladangan dan Komoditi

[17] Subsequently, on 26 August 2020, as a result of information concerning the completion of investigation and prosecution of charges against Kyrox, and Chew, the respondent, still claiming to be owners of the subject UCO, again wrote to MPOB seeking the release of the subject UCO pursuant to ss. 57 and 58 of the Act.

[18] The respondent's said letter reads as follows:

INNOVANS PALM INDUSTRIES SDN. BHD. (385096-K)

26 Ogos, 2020

LEMBAGA MINYAK SAWIT MALAYSIA
No. 6, Persiaran Institusi,
Bandar Baru Bang Acknowledge Receipt
Bandar Baru Bangi
43000 Kajang

Surat Berdaftar/Faks/Email

Untuk Perhatian:

(1) Penolong Pegawai Penguatkuasa (MPOB Wilayah Utara) En Nor Afendi Shahuddin

(2) Ketua Pengarah
Yg Berbahagia Dr Ahmad Parveez Ghulam Kadir

Tuan,

Notis di bawah Seskyen 57 dan/atau 58 Akta Lembaga Minyak Sawit Malaysia 1998 – Penutupan Dan Penahanan Tangki-tangki Minyak Masak Terpakai di Butterworth

Kami merujuk kepada perkara di atas dan surat kami bertarikh 8.7.2020. Kami selanjutnya merujuk kepada surat Lembaga Minyak Sawit Malaysia bertarikh 14.7.2020.

Pihak kami di fahamkan bahawa:

(1) Lanjutan daripada penyitaan UCO oleh pihak MPOB tersebut, pihak MPOB telah pun memperolehi laporan kimia ke atas UCO tersebut;

(2) Siasatan telah disempurnakan sejauh difahami oleh kami berlandaskan pertuduhan yang telah dibuat oleh MPOB terhadap satu Kyrox Sdn Bhd (No. Syarikat: 201801044797 (1306829-V)) dan satu Chew Gek Suan (No. K/P: 451203-08-5642) berkenaan dengan UCO yang telah disita oleh pegawai MPOB tersebut;

(3) Tiada tindakan atau sebarang pertuduhan apa jua pun diambil berkenaan dengan kontrak jualan diantara pihak kami dan Kazhou Pte Ltd sepertimana yang telah dipamerkan oleh dokumen-dokumen yang dibekalkan di dalam surat kami terdahulu dan juga semasa penyiasatan di premis perniagaan Innovans.

Memandangkan kami merupakan penjual dan pemilik sah UCO yang telah disita oleh pegawai MPOB tersebut dan tiada sebarang pertuduhan yang telah dibuat terhadap kami, diharapkan pihak MPOB dan/atau Ketua Pengarah MPOB boleh mempertimbangkan permohonan kami untuk perlepasan UCO kepada kami selaku pemilik menurut Seskyen 57 dan/atau 58 Akta Lembaga Minyak Sawit Malaysia 1998 dan berdasarkan latar belakang yang telah dinyatakan di dalam surat kami bertarikh 8.7.2020 tersebut.

Sila ambil perhatian bahawa notis ini adalah tanpa prejudis terhadap hak kami dan surat ini berhasrat memberi notis kepada pihak MPOB supaya tidak mengambil sebarang tindakan untuk melupuskan UCO tersebut dan/atau tindakan yang bercanggahan dengan hak kami selaku pemilik sah UCO tersebut.

Jasa baik Tuan/Puan di dalam perkara ini adalah amat dihargai dan didahului dengan ribuan terima kasih.

Yang benar
Dato' Tan Chee Chuan

Pengarah
Innovans Palm Industries Sdn Bhd

[19] MPOB responded *via* letter dated 27 August 2020 ('the impugned decision') and rejected the respondent's request citing the reason that investigation whilst completed pursuant to the law, the release of the subject UCO would be tantamount to an insult to the professionalism and integrity of their officers as an enforcement agency. The said letter reads as follows:

INNOVANS PALM INDUSTRIES SDN. BHD. (385096-K)

Ruj. Kami/Our Ref.: (11)04/C/PD/536/4 Jil. 1

27 Ogos 2020

YBhg. Dato' Tan Chee Chuan
Pengarah
Innovans Palm Industries Sdn. Bhd. Lot 11918, Jalan Ikan Bawal,
Telok Gong
42000 Port Klang
Selangor Darul Ehsan

YBhg. Dato',

Notis Di Bawah Seksyen 57 Dan/Atau 58 Akta Lembaga Minyak Sawit Malaysia 1998-Penutupan Dan Penahanan Tangki-tangki Minyak Masak Terpakai Di Butterworth

Dengan hormatnya surat YBhg. Dato' bertarikh 26 Ogos 2020 berkaitan perkara di atas dirujuk.

A 2. Sebagaimana YBhg. Dato' sedia maklum melalui surat kami rujukan (3) 04/C/PD/536/4 Jil. 1 bertarikh 14 Julai 2020 yang jelas maksudnya, kerja-kerja penguatkuasaan undang-undang Lembaga Minyak Sawit Malaysia (MPOB) sentiasa dijalankan mengikut kuasa yang diperuntukkan di bawah perundangan MPOB dan Prosedur Operasi Standard (SOP) yang ditetapkan.

B 3. Dalam hal ini, setelah siasatan dijalankan tindakan penguatkuasaan diambil mengikut perundangan MPOB. Tiada pengecualian dalam perkara ini, oleh yang demikian rayuan pihak YBhg. Dato' supaya melepaskan keluaran kelapa sawit yang disita tidak dapat dipertimbangkan. Jika rayuan ini diberi perhatian lanya adalah satu penghinaan kepada profesionalisme C dan integriti pegawai-pegawal MPOB sebagai sebuah agensi penguatkuasaan.

Sekian, terima kasih.

Yang benar,
DR. AHMAD PARVEEZ HJ. GHULAM KADIR
D Ketua Pengarah, MPOB

Judicial Review – Grounds

[20] The respondent sought to challenge the impugned decision based on the following reasons:

E (i) MPOB have ventured outside the parameters of the Act and the decision not to release the subject UCO is illegal and/or irrational because:

(a) the respondent insisted firstly that the purported export is by an entity known as Kyrox which is beyond their knowledge. MPOB further did not suggest that the respondent was a party to such act F or conduct by Kyrox;

(b) MPOB outright rejected the sale and export documents offered and produced by the respondent evidencing the sale of the subject UCO between the respondent and Kazhou, without even giving the right to the respondent to be heard; G

(c) MPOB ignored the fact that in any event, the respondent is fully licensed to enter into the FOB contracts with Kazhou and that neither the respondent nor Kazhou have been charged with any offence under the Act. As such, the sale of the subject UCO between H the respondent and Kazhou is above board and/or within the letter of the law;

(d) Kazhou being a Singapore company, a company incorporated outside Malaysia, is not required to have MPOB's licence to purchase UCO; and

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(e) the reasoning proffered by the respondent, that the integrity and professionalism of their officers will be compromised (if the subject UCO is released) has no evidential bearing at all to the determination of "ownership" under s. 57 of the Act and therefore the impugned decision is irrational and/or one made in breach of the rules of natural justice;

(ii) whilst MPOB has initially responded claiming that investigation is ongoing, the only outcome from such "investigation" clearly did not implicate the respondent as a seller in any manner whatsoever, and therefore the decision to seal the subject UCO and/or the refusal of MPOB to abide by s. 57 of the Act was to say the least, *mala fide*. The impugned decision is a clear manifestation of an abuse of powers and/or unfair and oppressive exercise of powers;

(iii) the action and the said impugned decision by MPOB in rejecting the respondent's request is also in breach of ss. 57 and/or 58 of the Act, is illegal and/or unlawful being *ultra vires* as the DG had failed to either release the subject UCO to the respondent and/or refer the matter to a Magistrate pursuant to s. 57(2) of the Act; and

(iv) the action and basis for MPOB and DG in attempting to forfeit, claim ownership and sell the subject UCO in response to an act of a third party, namely Kyrox is *mala fide* and one that is not arrived at based on actual transactional documents between a buyer and seller and is disproportionate and/or abusive without any proper check and balance.

[21] The respondent sought the following reliefs *via* JR50:

(i) an order of *certiorari* to quash the impugned decision;

(ii) a declaration that the impugned decision is erroneous in law and/or *ultra vires* and/or irrational and/or illegal;

(iii) an order of prohibition to prohibit MPOB and/or DG from taking any steps to enforce and/or assert any right of ownership or to sell the subject UCO;

(iv) an order of *mandamus* to compel MPOB and/or DG to release and/or return the subject UCO or the proceeds of any sale of the same thereof and all books, records, documents or other articles seized by MPOB and/or DG be released to the respondent within seven days from the date of this order herein;

(v) an order for general damages to be assessed;

(vi) costs;

(vii) such other or further reliefs as the High Court deems fit; and

(viii) a further order be granted under O. 53 r. 3(5) of the Rules of Court 2012 that the impugned decision and/or any and all claims for consequential right of enforcement/action by MPOB and/or DG under but not limited to ss. 53 and 55 of the Act arising from or relating to MPOB and/or DG's decision be stayed until the application for judicial review is finally determined and disposed of or until otherwise ordered by the High Court.

Issues Before The Honourable Court

[22] The JC framed the following questions as requiring a determination by the High Court:

(i) whether MPOB and/or DG had denied the respondent the due process available under s. 57 of the Act;

(ii) whether MPOB and/or DG has the power and/or jurisdiction under s. 57 of the Act to retain the subject UCO, as s. 57 expressly provides that the seized items be either released and/or referred to a Magistrate;

(iii) whether MPOB and/or DG acted outside its jurisdiction as an investigator and/or a judge in this case; and

(iv) whether MPOB and/or DG unilaterally and/or arbitrarily decided to ignore the contractual relationship between the respondent and Kazhou based on the documents offered and/or seized by MPOB.

[23] According to the respondent, the impugned decision had frustrated the completion of sale of the subject UCO between the respondent and Kazhou and/or the receipt of the balance payment from Kazhou. The respondent may also be subjected to potential breach of contract and/or litigation, which could have been avoided, but for the impugned decision. The respondent contended that in so far as the subject UCO is concerned, the UCO in some of the tanks sealed by MPOB, consists of part of the shipment delivered by the respondent to Kazhou pursuant to the FOB contracts and stored there pending submission of K2 Forms applied by the respondent and completion of payment obligations by Kazhou under the FOB contracts. According to the respondent, until the K2 Forms applied by the respondent are issued and cargo are paid in full by Kazhou, the subject UCO remains the property and ownership of the respondent.

[24] The respondent contended that upon their request, Kazhou has made partial payment for part of the subject UCO which had been delivered, though it was not obliged to as full delivery was not complete. The partial payment by Kazhou was said to have been made on a goodwill basis owing to the adverse effect of the movement control order on the business and cashflow of the respondent. It is alleged that the payments were made by Kazhou, and not by any other third party.

[25] The respondent took the position that once the subject UCO is loaded on board the vessel, they as "exporter" will be the party responsible and would have been the party to submit the K2 Form to the Malaysian Customs and Excise Duty Department. According to the respondent, MPOB had sealed the subject UCO on the (erroneous) premise that Kyrox was the "exporter" of the subject UCO to Kazhou.

[26] In so far as the respondent are concerned, they maintain that they have no knowledge, did not participate, and neither was there any suggestion from MPOB that the respondent was connected to Kyrox. It was highlighted that to date, there are no charges brought against the respondent and/or against Kazhou.

[27] In this regard, in the affidavit of Dato' Tan Chee Chuan (managing director) of the respondent affirmed on 2 July 2020 (filed for purposes of the intervener application in JR27), it was asserted that since 2019, they have been "exporting" UCO to Kazhou and that they would have been the party to submit the K2 Form to the Malaysian Customs and Excise Duty Department as they are the "exporter" of the subject UCO and they have no knowledge nor did they participate in the preparation of the other K2 Form submitted by other parties including by Kyrox.

[28] It is relevant to mention here that in JR27, Kazhou and Kyrox asserted that the letter was the "exporting agent", which is in stark contradiction to the respondent's stand that they are the exporter.

[29] We turn now to the arguments that were advanced on behalf of MPOB/DG. Counsel for the appellants argued that the impugned decision is not amenable to judicial review and that the order of *certiorari*, declaration and *mandamus* prayed for, if granted, will seriously interfere with or encroach into the criminal jurisdiction of the Magistrate's Court per Criminal Summons 376 and/or all the remedies prayed for, if granted, will be against the object and scheme of the Act and/or against public policy.

[30] It was submitted for MPOB/DG that when the phrase "referred to in sub-s. 56(3)" is used in s. 57(1) of the Act, the law must have intended that for any person to claim ownership of the seized products, such claims can only be made in cases where "there is no prosecution" as provided in s. 56(3) of the Act. It was argued that since a criminal charge has been preferred by the prosecution against Kyrox and Chew relating to the subject UCO which the respondent was aware of, the respondent's request in letter dated 26 August 2020 made pursuant to s. 57 of the Act, is in itself a "non-starter" because the same is "misconceived in law".

[31] It was contended that the respondent could not also rely on s. 58 of the Act because the respondent was not the "the person from whose possession, custody or control it was seized". The subject UCO were seized from "tangki-tangki penyimpanan FIMA Palmbulk" (*ie*, the storage tanks in Penang's Port) and not from the respondent or the respondent's premises.

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High Court – The Decision

[32] The High Court allowed the judicial review and held that the test for determining whether the decisions by a body of persons is subject to judicial review, is the source of the power. In this regard, MPOB, being a creature of statute *ie*, the Act, its decisions are therefore subject to review by the court. On the authorities, MPOB/DG must act within the limits of the Act and the High Court is empowered to determine if the limits prescribed in the Act have been exceeded by MPOB/DG. The Judicial Commissioner therefore opined that impugned decision is thus, amenable to judicial review.

[33] The JC rejected the arguments that were advanced on behalf of MPOB/DG. The JC said that it cannot be said as contended by MPOB/DG that the phrase "referred to in sub-s. 56(3)" in s. 57(1) of the Act means that any claim to ownership of the seized products can only be made if "there is no prosecution" as provided in s. 56(3) of the Act. According to the JC, the aforesaid phrase cannot be read and understood in isolation but must be read and interpreted in its entirety and when so read, it is clear that the phrase is with regard to "the oil palm product or the proceeds of sale thereof, or of the conveyance, machinery, contrivance, equipment, book record, document or other article" referred to in s. 56(3) of the Act, and not as contended by MPOB/DG.

[34] The JC held that the respondent, is a licensee of MPOB, and since no criminal charge having been preferred against them, they were legally entitled to write to the DG pursuant to s. 57 and/or s. 58 of the Act to request for the release of the subject UCO. In amplification, the JC held that:

(i) The purpose of the provisions in s. 57(2) of the Act is for owners such as the respondent to protect their proprietary rights and the recourse for MPOB/DG is to refer the matter to a Magistrate only when there is doubt as to the ownership of the subject UCO which was not the case in this instance. By refusing to release the subject UCO or alternatively, to refer respondent's request to the Magistrate as stipulated in s. 57(2) of the Act, MPOB/DG had thereby denied the respondent the right enshrined in the said provision. Hence, their decision/action is clearly *ultra vires* and/or illegal.

(ii) According to the JC, MPOB/DG's contention that pursuant to s. 56(1) of the Act, only the Magistrate can order the forfeiture or release of the subject UCO, since the prosecution involving the seized UCO has commenced, is inaccurate and misleading. Given the undisputed fact that the respondent is the owner of the UCO and there being no prosecution against it, by virtue of s. 56(3) of the Act, the officer in whose custody the subject UCO is held, is mandatorily required to

inform the respondent of the seizure of the subject UCO and only if no claim thereto is made within 30 days from the date of notification, can the subject UCO be taken and deemed forfeited under s. 56(5) of the Act.

[35] The JC concluded that on the facts, ownership of the subject UCO remained with the respondent and it being the legal owner of the subject UCO, there is no legal basis therefore for MPOB/DG to retain the same. On the issue of "ownership" the JC held at para. [43] that, "... the sale of the UCO has been concluded, the delivery has not been completely fulfilled at the time of seizure. Kazhou has yet to make full payment on the shipment and since it is an FOB contract, ownership of the UCO does not pass to Kazhou until full payment has been made". As such, the JC concluded at para. [44] that "ownership of the UCO remained with the (respondent) and since the (respondent) is the legal owner of the UCO, there is no legal basis for (MPOB) to retain the UCO".

[36] According to the JC at para. [45], MPOB did not, per the impugned decision, or the affidavits filed in JR50, dispute or challenge the respondent's ownership of the subject UCO. And as for the applicability of s. 58 of the Act, the JC opined at para. [46] that the respondent had ultimate control over the subject UCO and therefore the fact that they were not in possession of the same did not disentitle them from invoking s. 58 of the Act to seek the release of the subject UCO.

[37] The Judicial Commissioner also held that the fact that the subject UCO was seized from the FBI/FPS storage tanks and not from the respondent, or their premises does not preclude the respondent from relying on s. 58 of the Act. According to the JC, the respondent as owner of the subject UCO had "control" and therefore were entitled to rely on s.58 of the Act to seek a release of the seized items to themselves as the owners of the same.

[38] In so far as disposal of the subject UCO is concerned, the Judicial Commissioner held that the express intention of MPOB/DG to dispose the subject UCO to avoid mounting storage charges implied that the subject UCO had already been forfeited and that the averment in their affidavit herein that the subject UCO was needed as "evidence" in the prosecution of Kyrox and Chew, are not true. Hence, the JC opined that the impugned decision and the intended disposal of the subject UCO amounted to a deprivation of the respondent's proprietary rights therein, in breach of art. 13 of the Federal Constitution. The JC was of the view that in the absence of any wrongdoing on the part of the respondent, it should not be deprived of its proprietary rights in the subject UCO.

Our Decision

The Act – Relevant Sections

[39] We start by referring to the relevant sections of the Act.

[40] Section 53 of the Act reads as follows:

53 Sale and disposal of seized oil palm product

(1) The Director General may at any time direct that any oil palm product seized under this Act be sold and the proceeds of the sale be held **while waiting for the result of any prosecution under this Act** where:

(a) the oil palm product is of a perishable nature or easily deteriorates in quality;

(b) the custody of the oil palm product involves **unreasonable expense and inconvenience**;

(c) there is a lack or absence of adequate or proper facilities for the storage of the oil palm product; or

(d) the oil palm product is believed to cause an obstruction or to be a hazard to the public.

(2) Notwithstanding subsection (1), where an analyst certifies, or if the results of tests as certified by an analyst proves, that the oil palm product tested by him is contaminated, the seizing officer may keep it in custody or, if no prosecution is instituted in respect of the oil palm product, cause it to be disposed of in the manner determined by the Director General.

(emphasis added)

[41] Section 56 of the Act, reads as follows:

56 Forfeiture or release of seized oil palm product, etc.

(1) *If prosecution is instituted with regard to any oil palm or proceeds of sales thereof, or any conveyance, machinery, contrivance, equipment, book, record, document or other article seized under this Act, the court before which the prosecution with regard thereto has been held may order the forfeiture or release of the thing concerned*.

(2) The court shall order the forfeiture of the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article if it is proved to the satisfaction of the court that an offence under this Act has been committed and that the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article was the subject-matter of or was used in the commission of the offence, notwithstanding that no person may have been convicted of such offence.

(3) *If no prosecution is to be instituted with regard to any oil palm product or the proceeds of sale thereof, or any conveyance, machinery, contrivance, equipment, book, record, document or other article seized under this Act*, the authorised officer in whose custody it is held shall notify the person from whom the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article was seized of that fact and of the provisions of section 57.

(4) A notice under subsection (3) shall be in writing and shall be sent to the last-known address of the person concerned.

(5) If no claim is made under section 57 within thirty days from the date of service of the notice referred to in subsection (3), the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article seized shall be taken and deemed to be forfeited at the expiration of that period. (emphasis added)

[42] Section 57 of the Act reads as follows:

57. Claim for seized oil palm product, etc.

(1) **A person who asserts that he is the owner of the oil palm product or the proceeds of sale thereof**, or of the conveyance, machinery, contrivance, equipment, book, record, document or other article **referred to in subsection 56(3)** and that it is not liable to forfeiture may, personally or by his agent authorised in writing, give written notice to the authorised officer in whose custody it is held that he claims the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article.

(2) On receipt of the notice referred to in subsection (1), the authorised officer shall refer the matter to the Director General who may direct that the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article be released or may direct the authorised officer, by information in writing, to refer the matter to a Magistrate.

(3) The Magistrate to whom a matter is referred under subsection (2) shall issue a summons requiring the Board and the person asserting that he is the owner of the oil palm product or the proceeds of sale thereof, or of the conveyance, machinery, contrivance, equipment, book, record, document or other article and the person from whom it was seized to appear before the Magistrate and on their appearance or default to appear, due service of the summons having been proved, the Magistrate shall proceed to the examination of the matter.

(4) If it is proved that an offence under this Act has been committed and that the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article was the subject matter of or was used in the commission of such offence, the Magistrate shall order the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article to be forfeited, and shall, in the absence of such proof, order its release.

(5) **Any oil palm product or the proceeds of sale thereof**, or any conveyance, machinery, contrivance, equipment, book, record, document or other article forfeited or deemed to be forfeited shall be delivered to the authorised officer and **shall be disposed of in accordance with the directions of the Magistrate**.

A (6) The Board shall not be liable to any person for any deterioration, no matter how arising, in the quality of any oil palm product seized under this Act. (emphasis added)

[43] Section 58 of the Act reads as follows:

B 58 Release of seized oil palm product, etc.

58. Notwithstanding section 57, the Director General or any officer authorised by the Director General may, where he thinks fit, at anytime direct that any oil palm product or the proceeds of sale thereof, or any conveyance, machinery, contrivance, equipment, book, record, document or other article seized under this Part be **released to the person from** C **whose possession, custody or control it was seized**. (emphasis added)

[44] The questions that arise in this appeal are whether:

(i) the impugned decision being part and parcel of an exercise of investigative function by MPOB, is amenable to judicial review;

D (ii) the High Court in exercising its civil jurisdiction *via* judicial review, should decline the application as it may interfere with matters pending criminal trial at the Magistrates' Court; and

(iii) the impugned decision was made within the ambit of or contrary to the E law, was rational or irrational, or suffered from any procedural impropriety.

[45] We deal first with the question as whether the impugned decision is amenable to judicial review. As to whether a decision of a public authority, particularly one made by an investigative body, we state as a general F proposition, that not all decisions of a public authority are amenable to judicial review. In this regard, the Federal Court in *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; [2013] 2 MLJ 321 (FC), stated at p. 1022 (CLJ); p. 332 (MLJ) that:

[16] We have no hesitation in accepting that the executive's discretion, G whether by statute or prerogative is amenable to judicial review. However, whether such discretion is amenable to judicial review is dependent on the facts of each case (see *R Rama Chandran, Kumpulan Perangsang Bhd and Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625. **It was generally held in those cases that not every decision of the executive could be subjected to judicial review**. (emphasis added)

H **[46]** Hence, in judicial review proceedings, it is imperative for the High Court to make a determination whether a particular decision by a public authority is amenable to curial scrutiny *via* judicial review. In this regard, it is our view that the JC had misdirected himself in applying a single test approach, *ie*, solely based on "the source of power", as stated at para. [23] I of his grounds of judgment where he stated as follows:

> [23] **Thus, the test for determining a body of persons is subject to judicial review is the source of power**. In this instance, the 1st appellant is creation of statute *ie*, the MPOBA 1998. As such, its decisions are susceptible to review by this court. (emphasis added)

[47] We are inclined to agree with MPOB/DG that in determining the question of "justiciability" of an Executive decision, apart from the source of power, the High Court must also examine the function being performed by the person whose decision is being challenged.

[48] The case of *R v. Sloan* [1990] 1 NZLR 474 is instructive on this point. The issue before the court was whether the warning letters issued by the inspectors that Mr Sloan's operation was unlawful is reviewable. As the functions of the inspectors are merely investigative, the court held that they are not reviewable.

[49] At p. 479, Justice Hardie Boys said relevantly:

> Secondly, *it is not every decision made under statutory authority that is subject to review. A decision must go beyond what is merely administrative or procedural or the exercise of a function rather than a power*. Quite plainly, the conclusions reached by the inspectors here are of this kind and so are not reviewable. *To hold otherwise would, as Mr Neave submitted, open up the investigative process of all law enforcement agencies to constant judicial review; and that cannot have been the intention of Parliament*. (emphasis added)

[50] In *Ahmad Azam Mohamed Salleh & Ors v. Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 1 LNS 2009; [2004] 4 MLJ 86 (HC), Justice Raus Sharif (later Chief Justice) held that the public officers were merely exercising a function under the Co-operative Societies Act 1993, and the same is not reviewable by the court. At para. [12] of his judgment, the learned judge said:

> To hold such a process of inspection reviewable would open up the investigation process of all enforcement agencies to constant judicial review. ...

[51] The next case is *City Growth Sdn Bhd & Anor v. The Government Of Malaysia* [2005] 7 CLJ 422; [2006] 1 MLJ 581 (HC), where the applicants sought leave to commence judicial review proceedings to quash several orders made by the Deputy Public Prosecutor to seize the applicant's banking accounts pursuant to s. 50(1) of the Anti-Money Laundering, Anti-Terrorism Financing And Proceeds Of Unlawful Activities Act 2001. Again, the issue was one of "justiciability" and whether the said orders are reviewable by way of judicial review.

[52] In that case, Justice Raus Sharif said:

> Looking at the order of the Deputy Public Prosecutor as well as the provision of s. 50(1) of AMLA, I am of the view that the order of the Deputy Public Prosecutor is not reviewable under O. 53 of the RHC. To me, s. 50(1) of AMLA is part and parcel of the investigation process into

an offence under s. 4(1) of AMLA. It appears that in order to facilitate the investigation into the offence of money laundering, the law has provided with the Public Prosecutor the power to assist the investigating officer. Clearly, s. 50(1) of AMLA was enacted to enable the Public Prosecutor or his Deputy to make an order of seizure of movable properties in the possession of the financial institutions by ordering the financial institutions not to part, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied. Thus, by issuing the said orders the Deputy Public Prosecutor was merely exercising a function under AMLA.

It has been said before that not all decisions and action of a public officer is reviewable by the court. In *R v. Sloan* [1990] 1 NZLR 474, Justice Hardie Boys said: ... it is not every decision made under statutory authority that is subject to judicial review. A decision must go beyond what is merely administrative or procedural ... or the exercise of a function rather than a power ... Quite plainly, the conclusions reached by the inspector here are of this kind and so are not reviewable. To hold otherwise would, as Mr Neave submitted, open up the investigation process of all law enforcement agencies to constant judicial review; and that cannot have been the intention of Parliament.

Similarly, in *Haji Ahmad Azam bin Mohamed Salleh dan 5 lagi lawan Jabatan Pembangunan Koperasi Malaysia Dan 2 lagi* [2004] 4 MLJ pg 86 I held that the public officers exercising a function under the Cooperative Societies Act 1993, is not reviewable under O. 53 of the RHC.

Likewise in this case, the order of the Deputy Public Prosecutor under s. 50(1) of AMLA is also not reviewable. This must be so, otherwise if all decisions and action of public authority of this nature are amendable to court's review, then the government machinery may not be able to function smoothly. The investigation process of all law enforcement agencies will be open to constant judicial review. To borrow the words of Justice Hardie Boys in *R v. Sloan* (*supra*) 'that cannot have been the intention of Parliament.

[53] The principle that was enunciated in *R v. Sloan* was considered and approved by the Federal Court in *Suruhanjaya Pencegahan Rasuah Malaysia & Ors v. Latheefa Beebi Koya & Anor* [2017] 10 CLJ 1; [2017] 5 MLJ 349 (FC), where the applicants filed judicial review to challenge notices under s. 30(1)(a) of the Malaysian Anti-Corruption Commission Act 2009 requiring the solicitors to attend at the office of the Malaysian Anti-Corruption Commission ('MACC') to have their statements recorded. These solicitors had earlier been present when their own clients were giving their statement to the MACC. The High Court and Court of Appeal quashed the MACC's said notices. However, the Federal Court allowed the MACC's appeal and held that these notices are not amenable to judicial review. The Federal Court said:

[37] The weight of authorities tend to support the view that the actions or decisions of a public authority in exercise of its legitimate powers at the investigative stage are not amenable to judicial review. In *R v. Sloan* [1990]

1 NZLR 474, Sloan was convicted under the Gaming and Lotteries Act 1977 for operating an illegal game of chance by using certain machines. After his conviction, he converted the use of those machines to a prize competition, which is outside the scope of the Act. But the Inspectors of Gaming still considered the new scheme an illegal game and issued letters to Sloan to cease operations forthwith, coupled with a threat of enforcement. Sloan then applied for a review under the Judicature Amendment Act 1972 and sought a declaration that the new scheme was lawful under the Gaming and Lotteries Act 1977 and that no enforcement actions should be taken against him. The High Court dismissed the application for review, holding that the decision of the inspectors was not subject to review.

[38] *R v. Sloan* was favourably considered in *City Growth Sdn Bhd & Anor v. The Government of Malaysia* [2006] 1 MLJ 581; [2005] 7 CLJ 422. In the latter case, the applicants (City Growth Sdn Bhd & Anor) applied for leave under O. 53 r. 3 of the RHC for an order of *certiorari* to quash the order issued by the deputy public prosecutor under s. 50(1) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA') directing the banks not to part with or deal in or otherwise dispose of the movable property, including any monetary instrument in the name of the applicants, based on information pursuant to investigation that the movable property is related to commission of an offence under s. 4 of the AMLA. The High Court dismissed the leave application, holding that the order of the DPP was not amenable to judicial review. If all decisions and actions of public authority of this nature are amendable to review, the government machinery may not be able to function smoothly as the investigation process of all enforcement agencies would be open to constant judicial review. The High Court in *City Growth Sdn Bhd*'s case had in turn followed its earlier decision in *Ahmad Azam bin Mohamad Salleh & Ors v. Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 4 MLJ 86 where it held that the result of the inspection under the Co-Operative Societies Act 1993 was not amenable to judicial review.

[39] The decision in *City Growth Sdn Bhd*'s case was cited and approved by this court in *Empayar Canggih Sdn Bhd*'s case. The appellant, Empayar Changgih Sdn Bhd, was in the business of manufacturing video compact discs, which was licensed under the Optical Discs Act 2000 (Act 606). A raid was conducted at the new office of the appellant based on information that an offence under the Act could have been committed. During the raid, certain machines and equipment were seized and removed from the premises, causing some damage to the machines and equipment. The appellant filed an application for an order of *certiorari* against the respondents to quash the decision of the second respondent who refused to release the seized machines and equipment, and for an order of *mandamus* to compel the second respondent to release and return the seized machines and equipment.

A [40] Before the hearing of the judicial review application, the prayers were amended, limiting the reliefs only for a declaration that the seizure of the machines and equipment was done without reasonable cause. The High Court dismissed the application holding that, on the facts, the raid and seizure was based on a reasonable cause in exercise of an investigative function. Its decision was affirmed by the Court of Appeal. The appellant B was granted leave to appeal to this court against the decision of the Court of Appeal. One of the questions of law posed was:

> Whether in a judicial review application which challenges the validity of the respondent's decision ... to seize any article, optical disc, thing, book or document under s 38(7) of Act 606, it is C necessary for the respondents to justify the need for such seizure as being reasonably necessary in the context of the purpose for which the raid was conducted.

[41] The appeal was dismissed by this court. It was held in that case that an exercise of power in the course of a criminal investigation is not open to judicial review under O. 53 of the RHC. *To hold otherwise would be exposing the criminal investigative process of all law enforcement agencies in the country to constant judicial review which surely could not have been the intention of Parliament*. *It was also held that the seizure was made in the course of a criminal investigation of an offence pursuant to the powers conferred by the Act. Such seizure was not amenable to judicial review*. The appellant could have filed a writ E action for damages.

[42] The general conclusion that can be drawn from the cases referred to above is that *the actions or decisions of a public authority in exercise of its powers in the course of criminal investigation or enquiry is not open to judicial review*. Therefore the answer to the question posed to this court is that the F exercise of legitimate power, namely, the issuance of the notice pursuant to s. 30(1)(a) of the Act by the first appellant through the third appellant is not amenable to judicial review. The notice was issued in order to assist the appellants in the investigation of a corruption offence under s. 16(b) of the Act. *To hold otherwise, would expose the criminal investigative processes of all law enforcement agencies to constant judicial review*. On the facts of this case, G the respondents failed to establish that the notice was issued *mala fide* or in bad faith. (emphasis added)

[54] Based on the principles that may be distilled from the cases referred to above, we take the view that the criminal investigative process as well on the prosecutorial process must necessarily be immune from curial scrutiny H or interference *via* judicial review. As such, to allow judicial review in and over the subject UCO (or the SPO) will in our view interfere with Criminal Summons 376 instituted against Kyrox and Chew. Thus, we hold that the impugned decision is not amenable to judicial review.

[55] The next issue pertains to "forfeiture" of the subject UCO. In as much I as the subject UCO were seized by MPOB, there is a general power per s. 54 of the Act which provides that any seized products or proceeds of sale of the seized product made under the Act shall be liable to forfeiture. Section 54 reads:

Seized oil palm product, etc., liable to forfeiture

54. Any oil palm product or the proceeds of sale thereof, or any conveyance, machinery, contrivance, equipment, book, record, document or other article seized in exercise of any power conferred under this Act shall be liable to forfeiture.

[56] In any event, MPOB has instituted prosecution in relation to subject UCO and as such, it is our considered view that it is for the Magistrate presiding in Criminal Summons 376 to make the order for forfeiture (if any) or release of the subject UCO. Section 56(1) of the Act provides as follows:

Forfeiture or release of seized oil palm product, etc.

56. (1) **If prosecution is instituted** with regard to any oil palm product or the proceeds of sale thereof, or any conveyance, machinery, contrivance, equipment, book, record, document or other article seized under this Act, **the court before which the prosecution with regard thereto has been held may order the forfeiture or release of the thing concerned**.

(emphasis added)

[57] Indeed even if no person is convicted of any offence, the Magistrate has power to order forfeiture of the seized products. In this regard, s. 56(2) of the Act reads as follows:

56(2) **The court shall order the forfeiture** of the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article if it is proved to the satisfaction of the court that an offence under this Act has been committed and that the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article was the subject matter of or was used in the commission of the offence, **notwithstanding that no person may have been convicted of such offence**. (emphasis added)

[58] In so far as disposal of the subject UCO is concerned, it is not in dispute that the storage costs for the subject UCO are phenomenal. As mentioned earlier, the storage cost is RM331,200 per month. Thus, pending the outcome of the prosecution, in Criminal Summons 376, MPOB may, pursuant to s. 53(1) of the Act either sell or dispose the seized products, if further keeping of the seized products is no longer viable. Section 53 of the Act reads as follows:

Sale and disposal of seized oil palm product

53. (1) The Director General may at any time direct that any oil palm product seized under this Act be sold and the proceeds of the sale **be held while waiting for the result of any prosecution under this Act where**:

(a) the oil palm product is of a perishable nature or easily deteriorates in quality;

A (b) **the custody of the oil palm product involves unreasonable expense and inconvenience**;

(c) there is a lack or absence of adequate or proper facilities for the storage of the oil palm product; or

B (d) the oil palm product is believed to cause an obstruction or to be a hazard to the public.

(2) Notwithstanding subsection (1), where an analyst certifies, or if the results of tests as certified by an analyst proves, that the oil palm product tested by him is contaminated, the seizing officer may keep it in custody or, **if no prosecution** is instituted in respect of the oil palm product, cause C it to be disposed of in the manner determined by the Director General. (emphasis added)

[59] Thus, based on ss. 53, 54 and 56 of the Act where prosecution has been instituted for an offence under the Act, it is clear that the DG is empowered to secure and keep custody of the seized products or dispose of D the goods and keep the proceeds of the seized products, pending the outcome of the prosecution at the Magistrates' Court.

[60] In the result, we do not agree with the JC's conclusion that the impugned decision is amenable for review by way of judicial review as it is clear that the DG was merely exercising his part and parcel of "investigative E function" in refusing to entertain the respondent's claim for the release of the subject UCO which is in turn predicated on their assertion of purported "ownership" of the subject UCO.

[61] Clearly, by allowing the judicial review and compelling MPOB to return the subject UCO to the respondent, the High Court in the exercise of F its civil supervisory jurisdiction had effectively interfered with the criminal jurisdiction which is to be exercised by the Magistrates' Court under the Act.

[62] In so far as the issue of the respondent's assertion of "ownership" and the claim for release of the subject UCO under s. 57(1) of the Act is G concerned, the question is whether the DG is under a duty either to return the subject UCO upon demand made by the respondent, or to refer the demand to a Magistrate, when prosecution has been commenced relating to the subject UCO. The JC took the view that it was incumbent on the DG to either release the subject UCO to the respondent or refer the matter to the H Magistrate. According to the JC, there was no doubt as to the respondent's assertion of "ownership". As such, the DG ought to have released the subject UCO to the respondent. In this regard, we are of the view that once criminal prosecution has been instituted, then the matter is within the jurisdiction of the Magistrate in Criminal Summons 376 to deal with claims as to ownership or release or forfeiture of the subject UCO. (See: s. 56(1) of the Act). It is I only if no prosecution is instituted that the DG is then empowered to deal with the seized items under s. 57(1) of the Act.

[63] In the present case, clearly MPOB has instituted prosecution against Kyrox and Chew for an offence under reg. 5(1)(i) of the Malaysian Palm Oil Board (Licensing) Regulations 2005 (PU(A) 516/2005) per Criminal Summons 376. Thus, there is no question of any release of the seized items under s. 57(1) of the Act.

[64] Still on the topic of "ownership", the issue is not as simple as how the JC put it. This is especially so since Kazhou had asserted in JR27 that they are the owners of the subject UCO. Further, the respondent claims that they are the "exporters" whereas in JR27, Kyrox asserted that they are the "exporting agent" for Kazhou. The issue of "ownership" cannot therefore be determined summarily *via* judicial review.

[65] On the issue of ownership, it is also relevant to refer to para. 17 of the DG's affidavit which makes it abundantly clear that the appellants neither agree with nor disagree with the respondent's averment that they are the owner subject UCO since Kazhou has asserted in JR27 that they are the "owners", whereas Kyrox has asserted that they are the exporting agent for Kazhou.

[66] And since Kyrox has been implicated in Criminal Summons 376, it is clear that the issue of ownership, release forfeiture *etc* are all matters which must by law, be determined by the Magistrate who is to determine the outcome of the prosecution against Kyrox and Chew.

[67] As such, in the circumstances, for the reasons as stated above, we are impelled to the conclusion that the JC erred in applying s. 57(2) of the Act, without making a distinction between cases where prosecution has been instituted and cases where there are none as provided to in s. 56 of the Act.

[68] The JC also erred in leaping to the conclusion that the respondent is the legal owner of the subject UCO especially since there are indications to the contrary in the affidavit averments.

[69] Next, in so far as s. 58 of the Act is concerned, the issue is whether the respondent is "the person from whose possession, custody or control it was seized". Relevantly, the question here is whether s. 58 includes the (purported) owner of the seized product. Section 58 of the Act reads as follows:

> 58. Notwithstanding section 57, the Director General or any officer authorised by the Director General may, where he thinks fit, at any time direct that any oil palm product or the proceeds of sale thereof, or any conveyance, machinery, contrivance, equipment, book, record, document or other article seized under this Part be released to the person from whose possession, custody or control it was seized.

[70] The JC had ruled that the subject UCO is to be released to the respondent by virtue of s. 58 of the Act. However, it is clear that s. 58 of the Act applies to situations where there is no prosecution, and even if it is applicable, it would not be applicable to the respondent as they are not "the person from whose possession, custody or control it was seized". Section 58 of the Act provides as follows:

> Release of seized oil palm product, *etc.*
>
> 58. Notwithstanding section 57, the Director General or any officer authorised by the Director General may, where he thinks fit, at any time direct that any oil palm product or the proceeds of sale thereof, or any conveyance, machinery, contrivance, equipment, book, record, document or other article seized under this Part be released to the person from whose possession, custody or control it was seized.

[71] Here, the subject UCO was seized by MPOB at a storage facility at the FBI/FPS located at PPSB Deep Water Wharves, PO Box 243, 12700 Butterworth Port. The subject UCO was not seized from the respondent or their premises. We therefore disagree with the JC's interpretation of s. 58 of the Act and his determination that the respondent had "control" over the subject UCO when there was no evidence of such purported control.

[72] The JC also misdirected himself in holding that the DG's decision to sell the subject UCO (due to unreasonable expenses and inconvenience) amounts to a "forfeiture" when s. 53(1)(b) of the Act clearly provides that the DG may do so when "the custody of the oil palm product involves unreasonable expenses and inconvenience".

[73] In the result, we find that there is no procedural impropriety, abuse of power or any *mala fides* on the part of MPOB and the DG. Indeed, we are satisfied that the respondent has failed to meet the high evidential threshold to establish *mala fides* on the part of the appellants. It is relevant in this regard for us to quote from the decision of the Indian Supreme Court in *Union of India And Ors v. Ashok Kumar And Ors* [2005] 8 SCC 760 (SC) where it was said:

> ... burden of establishing *mala fides* is very heavy on the person who alleges it. The allegations of *mala fides* are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility. As noted by this Court in *E. P. Royappa v. State of Tamil Nadu and Another* (AIR 1974 SC 555), Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration ...

[74] Consequently, for the several reasons as discussed and stated above, we are of the view that the JC had fallen into error when His Lordship failed to apply the correct approach in determining the issue whether the impugned decision is amenable to judicial review.

[75] The JC seemed to have applied only a single test approach, *ie*, solely based on "the source of power", as stated in the impugned decision. Since prosecution relating to the seized products has been commenced, under s. 56(1) of the Act, only the Magistrate sitting at the said court has the power to make the order for forfeiture or release of the subject UCO.

[76] In allowing the judicial review application and in compelling MPOB to return the claimed products to the respondent, the High Court in the exercise of its civil jurisdiction had in effect interfered with the criminal jurisdictions to be exercised by the Magistrates' Court under the Act. This undoubtedly work against the doctrine of separation of civil and criminal jurisdictions of the courts, let alone public policy.

[77] There was also a failure on the part of the JC to properly appreciate the distinguished features between cases where there are prosecution and cases where there are none in s. 56 of the Act had led to an error of law that had vitiated the decision of the High Court.

[78] We are satisfied that since prosecution has commenced, the respondent as the alleged owner may not invoke s. 57(1) of the Act. Hence, we find this is a fit and proper case where appellate intervention is necessary.

[79] We allow the appeal. The decision of the JC dated 26 March 2021 is set aside and substituted with an order that the judicial review is dismissed. We order cost of RM30,000 here and below and subject to allocator fee.